

1 UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

2 -----x
STEVEN SCHREIBER,

3 Plaintiff,

4 versus

15 CV 6861 (CBA) (JO)

5 EMIL FRIEDMAN, et al.,

6 Defendants.

U.S. Courthouse
Brooklyn, New York

7 -----x
September 20, 2019
10:30 a.m.

8
9 Transcript of Civil Cause for Motion Hearing

10 Before: HONORABLE JAMES ORENSTEIN,
District Court Magistrate Judge

11
12 APPEARANCES

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20 Also Present:
CAROL NELKIN
21 JAY NELKIN
EUGENE SCHREIBER
22 STEVEN SCHREIBER

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24 Proceedings recorded by mechanical stenography. Transcript
25 produced by computer-aided transcription.

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1 (In open court.)

2 THE COURT: Good morning, everybody. Have a seat,
3 please.

4 THE CLERK: Civil cause for a motion hearing,
5 Schreiber versus Friedman, et al., Docket number 15 Civil 6861.

6 Would you all please state your appearances for the
7 record, starting with the plaintiff.

8 MR. ROSENBLATT: Thank you. Good morning, Your Honor.
9 Raphael Rosenblatt, from Rosenblatt Law P.C., on behalf of
10 Eugene Schreiber and Steven Schreiber, both of whom are here
11 with me in the courtroom today.

12 THE COURT: Good morning to all of you.

13 For the defense -- forgive me, for Nelkin?

14 MR. HYLAND: Nicole Hyland of Frankfurt Kurnit Klein &
15 Selz, on behalf of Nelkin & Nelkin.

16 MR. MAULSBY: Tyler Maulsby, Frankfurt Kurnit Klein &
17 Selz, on behalf of Nelkin & Nelkin.

18 MR. HYLAND: Good morning. You can identify
19 yourselves, or not.

20 MR. JAY NELKIN: Jay Nelkin, Nelkin & Nelkin.

21 MS. CAROL NELKIN: Good morning, Your Honor. I'm
22 Carol Nelkin.

23 THE COURT: Good morning to all of you. All right.
24 Folks, so we have the motion.

25 Just to take care of a housekeeping issue, Ms. Hyland,

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1 you can imagine my surprise when I saw the letter in which you
2 purported to believe that the order on the stipulation had
3 eliminated the current motion, this surprise arising very much
4 because, if I'm not mistaken, you yourself and also certainly
5 your clients had explicitly agreed that would not be the case.

6 So I'm going to give you the benefit of assuming that
7 it was a misrecollection and it was a mistake. But I take it
8 now you agree the issue properly remains before the court,
9 notwithstanding Judge Amon's order.

10 MR. HYLAND: Our position is that Judge Amon's order
11 dismissed all the pending motions with prejudice.

12 THE COURT: But that's clearly not what you agreed to,
13 and I will tell you this. That is absolutely not what Judge
14 Amon or I intended the order to do.

15 MR. HYLAND: Okay.

16 THE COURT: So by Monday, please, submit a letter that
17 puts in the language that you will agree would -- could be
18 substituted in to correct the clerical error, pursuant to
19 Rule 60(a), in Judge Amon's order so that there is no doubt
20 left on the record that the current motion is properly before
21 the court.

22 MR. HYLAND: Yes, Your Honor.

23 THE COURT: If you don't wish to do so, of course, you
24 know, I can draft it or Judge Amon can and make, you know, make
25 the correct order pursuant to Rule 60(a).

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1 I take it you have no disagreement with the court's
2 authority to do that, right?

3 MR. HYLAND: I would have to look at the case law on
4 that and examine that. I don't know.

5 THE COURT: In any event, please include the language
6 that, regardless of whether you think the court can or should
7 do that, includes language that you will not dispute produces
8 the result that had the order been entered in that way, you
9 would not and could not take the position that the order had
10 extinguished the motion.

11 MR. HYLAND: I'm just making a note, Your Honor.

12 THE COURT: Yes, of course.

13 MR. HYLAND: May I respond to one of the --

14 THE COURT: You may respond to anything you want.

15 MR. HYLAND: You stated that we agreed that that was
16 not the intent, and I just want to be very clear that we were
17 instructed to put in a joint letter. We don't know what the
18 intent of the parties were at the time that they filed the
19 stipulation. We accepted their representation to us that that
20 was their intent, but we didn't have any particular intent
21 because we didn't file the stipulation.

22 THE COURT: Okay.

23 MR. HYLAND: I just want to be clear about that.

24 THE COURT: Let me tell you this, that slicing the
25 salami that finely gives me some pause that goes beyond the

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1 immediate content of the representation.

2 It is always my hope that I don't have to actively,
3 you know, examine the words of counsel to figure out how many
4 ways counsel might intend it to be -- to be interpreted to
5 preserve a nonexplicit intention they would later pull out of
6 their pocket.

7 MR. HYLAND: I don't --

8 THE COURT: It is simply not consistent with what was
9 going on at the time, to say that the intention of the parties
10 was to extinguish this motion; and it was absolutely not the
11 court's intention to do so.

12 MR. HYLAND: I understand that now.

13 THE COURT: So, please, by Monday, whatever else you
14 are going to say about the case law, about your intentions,
15 about what good faith you have been acting in at all times --
16 because as I said, I'm prepared to give you the benefit of the
17 doubt on that -- please just provide the language that you will
18 never contest, suffices to make clear that the instant motion
19 was not intended to be extinguished by the court's order on the
20 stipulation, so that the court can, pursuant to Rule 60(a),
21 make the correction necessary to avoid further needless
22 litigation on that issue.

23 Because what I don't intend to be something that
24 continues to go on in this case is gotcha litigation, where
25 your clients say, aha, we got you to say something that you

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1 didn't mean and therefore you are stuck with it.

2 MR. HYLAND: I just want to be clear that's not what
3 I'm saying.

4 THE COURT: I appreciate that.

5 MR. HYLAND: That is not what I'm saying.

6 THE COURT: I appreciate that, and I'm glad to hear
7 that, because then there won't be any question going forward
8 that the issue is properly before the court.

9 MR. HYLAND: I understand what you are saying.

10 THE COURT: I take it that you agree that the court
11 can take action now, to make sure that the instant motion is
12 properly before the court now.

13 MR. HYLAND: I accept your understanding. I don't
14 know.

15 THE COURT: I'm not asking you to accept my
16 understanding. I'm asking if you are going to contest it.

17 MR. HYLAND: I don't know. I don't know. I haven't
18 looked into that issue, but I understand what you are saying
19 and I understand what you are asking me to do.

20 THE COURT: Well, I will also note then that it is
21 hard for me to understand that it was never your intent to
22 mislead the court and then say but we are not going to accept
23 that you can undo what may have been a misimpression, even if
24 we didn't intentionally cause it.

25 MR. HYLAND: I don't know if -- because I have to look

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1 at the case law, I don't know if the timing has expired for the
2 Schreibers to --

3 THE COURT: Here is what you don't need case law to
4 understand at all: Whether your clients will take the position
5 that if the court's orders on the stipulation, by virtue of a
6 clerical error, mistake of understanding of what you guys all
7 intended, extinguished a motion that it did not intend to
8 extinguish, that it can undo that error under Rule 60(a).

9 Regardless of what case law says about it, you can
10 tell me if your clients will take the position that the motion
11 remains extinguished or was extinguished and remains so,
12 notwithstanding the court's understanding.

13 MR. HYLAND: Will you give me time to consult with my
14 clients about that?

15 THE COURT: Yes, absolutely. Take a moment.

16 (Pause.)

17 THE COURT: All right. Ms. Hyland?

18 MR. HYLAND: Your Honor, I think we will need more
19 time to look into this and come back to the court on it.

20 THE COURT: To be clear, I will certainly give you
21 time to get back. The issue that you want to preserve the
22 ability to get back to me on is whether your clients can
23 continue to take the -- wrongfully take the position that the
24 court may not resolve the motion we are here to argue today.

25 MR. HYLAND: Our --

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1 THE COURT: Wait.

2 MR. HYLAND: Sorry, I didn't know if you were
3 finished.

4 THE COURT: No, I'm trying to come up with the words.

5 Your clients are trying to preserve their position to
6 say that the court extinguished the motion and cannot resolve
7 it, whether under a Rule 60 correction to its earlier order or
8 any other means, even if its intention at all times was to
9 preserve its ability to resolve the motion on the merits.

10 That's that your clients wish to think about and preserve their
11 ability to contest, right?

12 MR. HYLAND: I don't know that I would frame it
13 exactly that way.

14 THE COURT: I'm sure you would not; and I'm asking
15 you, my having framed it that way, so that I can understand
16 what you are asking to do.

17 Is that a fair characterization of what your clients
18 wish to think about and preserve for now their ability to do;
19 and that is a yes-or-no question, please. I will, of course,
20 listen to any explanation after I hear the word yes or no.

21 MR. HYLAND: Yes.

22 THE COURT: Okay.

23 MR. HYLAND: Because it's our understanding that this
24 was a voluntarily dismissal that was filed by the Schreibers.
25 They filed the stipulation of dismissal. That dismissal said

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1 we are dismissing all pending motions with prejudice, and this
2 is a pending motion.

3 Whether they intended to do that or not isn't really
4 relevant because, even if they made a mistake, they had a
5 remedy; and that was to come to the court and file a motion to
6 correct that or vacate that. The time for them to do that
7 expired.

8 THE COURT: Very good.

9 MR. HYLAND: I would like to make my record.

10 There may be jurisdictional reasons why that's a final
11 determination. We have to look -- I would be remiss if I did
12 not look into that first, before committing on the record today
13 to what you are asking me, Your Honor.

14 THE COURT: Fair enough. I understand the position
15 you are taking.

16 I don't think you would be remiss in the slightest if
17 what your clients wished to do was to make sure that the court
18 resolved something on the merits that it always intended to
19 resolve on the merits, notwithstanding the possibility that it
20 framed an order in a way that did not capture its intentions.

21 To my mind, many parties, particularly parties who are
22 themselves lawyers, would be avid to avoid having the court
23 believe that that was their intention and would direct their
24 counsel to waive any possible argument to preserve such a
25 position. They have no obligation to do that. I just wanted

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1 to make clear, that is what your clients, who are officers of
2 the court, actually wish to do; and, if that's what they wish
3 to do -- and you would be remiss in not preserving them their
4 right to do something that they wish to do -- then, of course,
5 when you send your letter on Monday with the language you can
6 include any argument on it that you think.

7 MR. HYLAND: Yes, Your Honor.

8 THE COURT: Okay. Let's hear, recognizing that you
9 think there are no arguments to be had -- and you are, of
10 course, free, consistent with that position, to stay silent on
11 the motion -- I will entertain oral argument.

12 It's your motion, Mr. Rosenblatt. I will hear you.

13 MR. ROSENBLATT: Thank you, Your Honor. I will keep
14 it very brief because I think we have really expressed our
15 position straightforward in the motion papers.

16 We have attached declarations of both Eugene and
17 Steven, and attached relevant documentation that shows that the
18 Nelkins began their relationship with my clients as their
19 advocates and once money became involved and their fee became
20 an issue, became their staunchest adversaries.

21 There is a pattern of conduct here in which the
22 Nelkins put their own interests before those of their clients,
23 violated a number of rules of professional conduct in doing so,
24 including RPC 1.1, avoiding harm to the client; RPC 1.5, about
25 fees and the reasonableness of fees; 1.7, conflicts of

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1 interest, in which the lawyer's judgment will be adversely
2 affected by the lawyer's own financial, business, property, or
3 other personal interests; business transactions, under 1.8, in
4 which they attempted to take equity in their client's company
5 without informed consent and without proper disclosures; and
6 RPC 3.3, candor to the tribunal, when, in fact, they had filed
7 a complaint against their own client and appeared in court the
8 same day, never advising the court that that had been done,
9 never seeking leave to withdraw, and, frankly, just keeping it
10 a secret from everybody, including the clients that they had
11 just sued.

12 There are practical effects to all of their conduct.
13 Aside from the fact that the settlement in this case was
14 delayed by more than six months because the charging lien that
15 was filed confused the other side about how to proceed in terms
16 of paying out the settlement, in terms of turning over the
17 equity of the shares in the company that were going to be
18 surrendered, many other issues that came before this court that
19 had to be litigated and discussed, even this motion practice
20 today.

21 There was delay, severe prejudice to my clients. And
22 it could have been avoided so easily. That's what's really
23 amazing about all of this. If in fact the Nelkins are to be
24 believed that my clients were so obstinate and were so -- were
25 refusing to pay their counsel fees, which is not the case, but,

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1 even assuming that were true, the Nelkins had remedies besides
2 self-help and vigilante justice.

3 They could have gone to the court. Your Honor saw all
4 of the proceedings and saw what was going on; and they could
5 have moved before the court and said, Your Honor, we have
6 problems, we are having some problems with our clients, we
7 don't want to prejudice them, but we need to get the court's
8 relief; and there were so many avenues that they could have
9 pursued that would have preserved their clients' while also
10 preserving their rights. But, instead, they didn't do that.
11 Instead, once money became an issue, they tried to take a piece
12 of their client's business; and, again, the facts of who raised
13 that issue are, frankly, kind of irrelevant, whether my clients
14 raised it or the Nelkins raised it, that's not a fact issue --

15 THE COURT: Which is it?

16 MR. ROSENBLATT: Well, our position is that the
17 Nelkins raised it, and the proof of that, so to say, is the
18 fact that there were not the disclosures that would otherwise
19 be required under 1.8; that if in fact the Schreibers had
20 suggested that outcome, you would think, particularly in view
21 of the amount of the fee involved, that the Nelkins would have
22 bent over backwards to make disclosures and said, Are you sure
23 you want to do this? We are taking an interest in the company
24 that you fought so hard to protect. Are you sure you want to
25 do this? Please go see another attorney and talk to them.

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1 But that's not what happened. In fact, we don't have
2 any of those disclosures.

3 And the notion that RPC 1.8 was not violated because
4 that -- my clients had the sense not to allow that and because
5 the transaction never went through, I don't think that's how
6 you get around Rule 1.8 and its obligations for informed
7 consent.

8 THE COURT: Let me ask about that. So you are saying
9 that the rule applies if counsel raises or participates in a
10 discussion about the issue without proper disclosures, even if
11 the contemplated transaction never happens. Because I
12 thought -- I thought, and not having, honestly, looked at that
13 rule prior to today, I thought that here is what you may not do
14 absent informed consent.

15 MR. ROSENBLATT: I think you are right. I think your
16 reading of that is correct.

17 THE COURT: So if you may not do it absent of informed
18 consent, the violation would be doing it combined with the
19 absence of informed consent. If it's never consummated, how do
20 you get to that violation?

21 MR. ROSENBLATT: Well, again, I think your question is
22 right in terms of the fact that it didn't take place means that
23 they didn't overtly violate RPC 1.8. In other words, you can't
24 violate it if you don't go into business with your clients.

25 THE COURT: So how can that be the basis for your

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1 motion? I know there are other bases.

2 MR. ROSENBLATT: It's not. My point is it's evidence
3 of one of a number of RPC violations.

4 THE COURT: Okay. I understand. So as part of the
5 mix of circumstances that support a conclusion as to other
6 claimed violations, but you are not complaining that they
7 violated 1.8 itself.

8 MR. ROSENBLATT: Correct.

9 THE COURT: Good. That wasn't clear to me.

10 MR. ROSENBLATT: There was no explicit violation of
11 1.8, to clarify that.

12 THE COURT: All right.

13 MR. ROSENBLATT: Just moving to the legal standard,
14 the case law that's set forth in our moving papers, our reply
15 papers -- and, frankly, even in the Nelkin papers -- show that
16 an attorney owes a duty of loyalty to his or her client; and
17 that duty is paramount and, obviously, an attorney is entitled
18 to collect a fee and, obviously, an attorney has certain
19 remedies to help them enforce that fee.

20 THE COURT: Including suing the clients, under the
21 proper circumstances, yes?

22 MR. ROSENBLATT: Including suing the client under the
23 proper circumstances --

24 THE COURT: There is no disagreement with that
25 proposition.

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1 MR. ROSENBLATT: They have the right to do that, but
2 subject to certain rules, subject to certain disclosures,
3 subject to certain requirements. And, frankly, I'm not
4 convinced that this is the case it should have happened in
5 because, again, the Nelkins' complaint, at least in their
6 papers, is that the Schreibers were refusing to pay their fee,
7 the settlement was being done, it had -- this fee issue had to
8 be resolved, they had no other choice but to file the charges
9 and call their clients fraudsters and acting in bad faith on
10 the record in front of full view of the opposition sue them;
11 but, in fact, that's not the case.

12 THE COURT: Wait. I want to separate two arguments
13 that you are making there and see if you are making either or
14 both.

15 Are you saying that, regardless of the circumstances
16 surrounding their filing of the lawsuit and other factors that
17 you rely on, that one potential basis for granting the motion
18 is simply that they sued for fees because it hadn't gotten to
19 the point where they could properly do that?

20 MR. ROSENBLATT: I'm saying -- I'm actually kind of
21 making two arguments.

22 THE COURT: I know you are. I'm trying to untangle
23 them.

24 MR. ROSENBLATT: So let me clarify.

25 THE COURT: Look, I absolutely get the argument,

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1 because that's clear on its face, that you are saying the way
2 they went about suing, and other circumstances as well
3 predating the lawsuit, support a disqualification for cause.

4 MR. ROSENBLATT: Correct.

5 THE COURT: What that doesn't say is whether you also
6 think they would be disqualified for cause simply for having
7 filed a lawsuit prior to there being a sufficient predicate for
8 doing so.

9 MR. ROSENBLATT: As an alternative grounds, is that
10 what you are saying?

11 THE COURT: Yeah.

12 MR. ROSENBLATT: Yes, I do.

13 THE COURT: So, even if they had done it the way
14 lawyers should, including withdrawing before filing suit, give
15 whatever notice, based on the state of negotiations between
16 your client and the Nelkins at the time they filed the
17 lawsuit -- and leaving aside procedural things, like whether
18 they should have withdrawn -- it would have been a basis for
19 disqualification and forfeiture of their fee to sue for their
20 fees.

21 MR. ROSENBLATT: Okay. Well, let me answer it this
22 way.

23 THE COURT: No, I know. Don't answer it a particular
24 way because that's a yes-or-no question so I understand what
25 argument, what relief you are seeking and the basis for it.

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1 Are you making that argument -- that's simply suing at
2 that stage in the negotiations -- by itself was a basis for
3 disqualification and forfeiture of the fee?

4 MR. ROSENBLATT: I think my answer is no but with a
5 qualification.

6 THE COURT: Okay.

7 MR. ROSENBLATT: And the qualification is that the
8 circumstance that we are looking at is that they sued without
9 having those preconditions met. The act of suing, in and of
10 itself, I don't believe, is grounds for qualifications.

11 THE COURT: That's really what I am asking. Go on.

12 MR. ROSENBLATT: That's not what I'm saying, but I am
13 saying that under the circumstances of this case, these facts,
14 the very act of suing --

15 THE COURT: That I get. Yes, I understand that to be
16 your argument.

17 MR. ROSENBLATT: Okay. That's fine.

18 Again, as we set forth in our papers, that lawsuit
19 really was the culmination of bad actions by the Nelkins, that
20 put their interests way before those of their clients and
21 prejudiced their clients; and what I was sort of veering into
22 when I started this line of argument was the legal standards
23 set forth in our papers, and even in Nelkins' papers, show that
24 when you don't -- when you put your interests above those of
25 your client, that is grounds for disqualification for cause.

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1 And, in fact, the case law that is rife throughout
2 both sets of papers are cases where an attorney represented,
3 say, for example, two criminal defendants in the same case, or
4 there was representation, concurrent representation in a matter
5 or by a firm, or there was representation of one client who
6 sued another client, a former client. So we are not even
7 talking about a direct adverse conflict. We are talking about
8 a situation in which attorneys were disqualified for cause
9 because they created situations in which their loyalty
10 necessarily was divided and they couldn't favor one client over
11 another, let alone themselves.

12 So this case goes even further than those cases in
13 which counsel has been disqualified for cause, because here it
14 was a direct conflict with their client that was created; and
15 it's important to note -- excuse me. It's important to note
16 that in one of the cases that we cited in our reply papers the
17 court talked about sort of the due of loyalty, about suing a
18 client for fees while also representing them.

19 This was in the criminal context, but the court was
20 clear to note that it's often possible for an attorney to
21 separate him or herself from a fee dispute, suing a client for
22 fees, while also putting their interests first in the case in
23 which they are representing him. For example, a criminal case
24 they still need to be zealous advocates for their clients, yet
25 they can still sue them for fees down the road or at the same

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1 time they represent them; and that, in and of itself, is not a
2 disqualifying conflict, which I think may answer, in a
3 roundabout way, Your Honor's prior question about the act of
4 suing itself.

5 But what's clear from all of the case law is that when
6 you put your interests above those of your client, particularly
7 when it causes prejudice, particularly when it causes delay,
8 particularly when it's based, frankly, on fiction in terms of
9 the valuations and the things that you are demanding, and you
10 don't protect yourself -- and particularly when you are talking
11 about a fee of this magnitude, whatever it may be --

12 THE COURT: Well, we don't know what it is? We know
13 what they have claimed, yes?

14 MR. ROSENBLATT: We know what they have claimed.

15 THE COURT: Before I forget it, just as a factual
16 matter, I know the settlement with the defendants had a number
17 of components, monetary and otherwise. Just compare for me --
18 because I have lost sight of the relationship between the
19 claimed fee and the monetary portion of the settlement.

20 MR. ROSENBLATT: Well, the claimed fee was based on a
21 number of factors.

22 THE COURT: Just what's the amount, if you know?

23 MR. ROSENBLATT: Their claimed fee was -- the number
24 that came out, in terms of their discussions, the final number
25 was 2.75 million, which would value the settlement at around 8,

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1 which the Nelkins claim was a discount to the actual --

2 THE COURT: I know, but the amount that they are
3 seeking fees, you are saying, is 2.75?

4 MR. ROSENBLATT: That's the amount.

5 THE COURT: I didn't intend this to be a difficult
6 question for anyone. Is that in dispute?

7 MR. HYLAND: We don't know the value of the
8 settlement. So we don't know what the one-third would be.

9 We did have settlement negotiations where we reached
10 an agreement in principle on 2.75 million, but that was a
11 settlement discussion.

12 THE COURT: But then maybe the way to ask it -- and
13 I'm sorry to derail your argument. I just don't want to lose
14 sight of this. This has gone on for so long, and I have
15 forgotten some of the things.

16 MR. ROSENBLATT: That's all right.

17 THE COURT: The claimed fee is -- I don't mean to be
18 contentious at all about this; I just want to understand -- pay
19 us in cash a percentage of the overall value of the monetary
20 and nonmonetary components of the settlement, correct?

21 MR. HYLAND: They would be owed a cash payment for
22 one-third of the value of the settlement, whatever that would
23 turn out to be.

24 THE COURT: All right. Let me ask you one other
25 question on this line, and I will let you go on.

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1 How much of the -- how much -- wrong question.

2 How much cash came over with this settlement?

3 MR. ROSENBLATT: 1.75 million, which is being held by
4 the court.

5 THE COURT: Right.

6 MR. ROSENBLATT: Ballpark.

7 THE COURT: Right, and everything else was
8 nonmonetary?

9 MR. ROSENBLATT: It was nonmonetary, yes.

10 MR. HYLAND: There was another, I believe, million
11 dollars that was paid; and that money was used by the
12 Schreibers to buy out Mr. Koenig.

13 THE COURT: That was paid in cash?

14 MR. HYLAND: I believe so.

15 THE COURT: So there is about 2.75 in cash payments?

16 MR. JAY NELKIN: Your Honor, I think it was 2.8.

17 THE COURT: 2.8 in cash paid, and the total value, I
18 know, is in dispute. So if you can say -- and, please,
19 ballpark figures -- what you each think the overall value of
20 the settlement was.

21 MR. ROSENBLATT: My clients' view, the whole
22 settlement is maybe \$3 million.

23 THE COURT: Okay.

24 MR. ROSENBLATT: But that's the whole value of the
25 settlement.

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1 THE COURT: And the Nelkins?

2 MR. HYLAND: We have seen valuations of the equity
3 somewhere -- anywhere between 6 million and 25 million.

4 THE COURT: What do you think it's worth?

5 MR. HYLAND: 20 million, 22 million.

6 THE COURT: You say it's worth 20 million?

7 MR. HYLAND: That's our best guess based on the
8 information we have.

9 THE COURT: So they have two-point --

10 MR. HYLAND: They haven't asked for that.

11 THE COURT: What are you asking for?

12 MR. HYLAND: They have said all along that they would
13 agree to the settlement proposal made by the Schreibers of
14 2.75 million.

15 THE COURT: So almost, it's not exactly equal to the
16 total cash paid as part of the settlement.

17 MR. HYLAND: Coincidentally.

18 THE COURT: Coincidentally. All right.

19 I'm sorry. I took you off track. Go ahead.

20 MR. ROSENBLATT: That's okay. And I hope -- I know
21 Your Honor will, but feel free to interject if there is a
22 specific question.

23 THE COURT: You know me well. You know that.

24 MR. ROSENBLATT: I do. Frankly, I think I'm actually
25 wrapping up, because, as I mentioned, this is a classic case --

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1 unfortunately, not classic because it's unusual and to the
2 degree in egregiousness of what the Nelkins did in terms of
3 putting their interests above those of their clients; but this
4 is a case that falls right within the rubric of putting your
5 own interests above those of your clients and prejudicing your
6 client as a result and, frankly, taking a lot of the court's
7 time, the defendants' time, delaying the settlement, harming my
8 clients' business in terms of their ability to do expand their
9 business and run their business because this money has been
10 tied up. The charging lien has prejudiced them.

11 And, certainly, we submit that the court should not
12 countenance this type of behavior and should find that they
13 were discharged for cause and vacate the charging lien and
14 just -- obviously Your Honor is going to give me an
15 opportunity, but, to the extent I could respond to any argument
16 they are going to make, I would ask for that.

17 THE COURT: Before you turn -- I have a question. The
18 relief you want is disqualification and for them to forfeit any
19 fee.

20 MR. ROSENBLATT: Yes.

21 THE COURT: My recollection from some months ago, when
22 the issue was starting to emerge, was that your clients had not
23 yet paid costs, you know, vouchers from vendors that the
24 Nelkins engaged on your clients' behalf during the litigation.

25 Have your clients now paid those?

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1 MR. ROSENBLATT: Yes. So -- well, yes and no. They
2 have entered into a payment plan. The largest outstanding
3 invoice was to Stroz Friedberg, which is the forensic company
4 that was doing the computer.

5 THE COURT: I know.

6 MR. ROSENBLATT: They have entered into a payment plan
7 with Stroz. They resolved that amount and have started
8 payment.

9 THE COURT: I don't need to know chapter and verse
10 after that, but the bottom line is your clients are assuming
11 responsibility for the cost; and this dispute is -- will --
12 there is no resolution of this dispute that leaves the Nelkins
13 shouldering the costs for outside vendors.

14 MR. ROSENBLATT: My clients are paying the outside
15 vendors, yes.

16 THE COURT: You know that that's not the question I
17 asked.

18 MR. ROSENBLATT: No, it isn't.

19 THE COURT: So please answer the question.

20 MR. ROSENBLATT: Yes.

21 THE COURT: Are you waiving any argument that the
22 resolution of this motion should include the Nelkins having to
23 pay costs that they incurred and paid on behalf of your
24 clients? I assume that's not what you are seeking. Right?

25 MR. ROSENBLATT: No. Well, we are not --

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1 THE COURT: I'm not safe in making that assumption?

2 MR. ROSENBLATT: Can I clarify?

3 THE COURT: And folding that into the analysis of your
4 motion?

5 MR. ROSENBLATT: I just want to clarify my answer.

6 THE COURT: Yes.

7 MR. ROSENBLATT: We are not seeking that in this case
8 at all; but, to the extent that down the road -- and I don't
9 know whether my clients will have claims against the Nelkins
10 for anything else besides their fee at some point --

11 THE COURT: I think your clients are trying to resolve
12 the matter here with finality.

13 MR. ROSENBLATT: Absolutely.

14 THE COURT: So you are not trying to preserve some
15 later claim?

16 MR. ROSENBLATT: No.

17 THE COURT: So what am I missing? It sounds like you
18 are saying your clients are going to make things right with the
19 vendors and not leave the Nelkins holding the bag on that in
20 any way, and you are not trying to preserve their ability to do
21 that. That's what I infer.

22 Tell me if there is some daylight between that and
23 what you are saying.

24 MR. ROSENBLATT: You are correct.

25 THE COURT: Okay.

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1 MR. ROSENBLATT: Which, but I just wanted to clarify
2 that to the extent my clients are out of pocket for things they
3 paid during the course of this litigation that the Nelkins
4 continued them to -- for example, Stroz and the way Stroz was
5 managed -- my clients are not preserving any claims in this
6 case. We want it done, but to the extent they may make a claim
7 down the road for something --

8 THE COURT: That who may make a claim?

9 MR. ROSENBLATT: The client, the Schreibers.

10 THE COURT: For example -- and I'm not at all
11 suggesting there should be anything down the road; quite the
12 contrary.

13 MR. ROSENBLATT: Understood.

14 THE COURT: I strongly wish you guys would work it out
15 here and get out of each other's lives, to the extent you can.

16 If there is something in the nature of malpractice or
17 some other affirmative claim you might seek to recover from
18 them what you paid to vendors.

19 MR. ROSENBLATT: Correct.

20 THE COURT: But you are not seeking to have them bear,
21 in the first instance --

22 MR. ROSENBLATT: Correct.

23 THE COURT: -- the responsibility to pay the vendors.

24 MR. ROSENBLATT: Correct.

25 THE COURT: Got it.

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1 MR. ROSENBLATT: I just didn't want it to be on the
2 record that somehow I had waived.

3 THE COURT: I'm not trying to go that far. I just
4 want to make sure that, in terms of outstanding bills from the
5 vendors, in the first instance, your clients are committed to
6 taking care of those and not seeking to leave the Nelkins
7 responsible for that, regardless of any later claim you may
8 have that they have damaged you in some way by causing you to
9 incur those costs.

10 MR. ROSENBLATT: Correct.

11 THE COURT: With that, let me turn to you.

12 MR. ROSENBLATT: Thank you, Your Honor, for your time.

13 THE COURT: Ms. Hyland, I will hear you.

14 MR. HYLAND: Thank you, Your Honor. Today the
15 Schreibers are asking this court to deprive the Nelkins of any
16 fee for the more than three and a half years of work, the
17 effort, the time, the energy, and the passion that the Nelkins
18 invested in this case on behalf of the Schreibers. They want
19 to take all of that away. That's an extreme result and extreme
20 penalty, to find that a lawyer is terminated for cause and to
21 forfeit their entire fee.

22 So we get that there is a lot at stake here today, but
23 what is at stake here today pales in comparison to what was at
24 stake four years ago for the Schreibers. Four years ago, for
25 the Schreibers, they were about to lose their entire business,

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1 a business they founded, they created, they worked hard. They
2 poured their time, their effort, their energy, their passion
3 into making into a successful business. They were about to
4 lose it all because they made a bad decision to associate with
5 someone, Mr. Friedman, who took advantage of them and turned on
6 them and was about to take everything they had.

7 The Nelkins stepped in, and they are the ones that
8 rescued the Schreibers from that situation. They stepped in,
9 when no other law firm would do it on a contingency. They came
10 in and they worked hard and they devoted themselves to making
11 sure that the Schreibers did not lose their business.

12 And, at the end of that process, they didn't just
13 rescue and save the equity that the Schreibers were going to
14 lose, their minority interest. They got them the entire
15 company. They got rid of this bad actor. They extricated the
16 Schreibers from this relationship. They got the entire
17 business plus enough money, a million dollars, to buy out the
18 fourth partner, the one who -- I don't know if you remember --
19 was the holdout in the settlement, Mr. Koenig. So they got rid
20 of all of the partners.

21 The Schreibers now control the entire business, and
22 they have never said -- and it was undisputed -- that this was
23 a great result for them. They were very happy with this
24 result.

25 THE COURT: Sorry for the interruption. I understand

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1 the rhetorical appeal of framing it in that way, and I'm not
2 trying to keep you from doing it; but I just want to make sure
3 I'm not misunderstanding. You are not contending that the
4 quality of the work done before the events giving rise to the
5 motions themselves is -- the decision as to whether the motion
6 should be granted shouldn't turn on my assessment -- or
7 ultimately Judge Amon's assessment -- of the quality of the
8 work that your clients did, right?

9 MR. HYLAND: I think it's relevant.

10 THE COURT: You really want this to be a referendum,
11 in part, on how well your clients performed and how much of the
12 result is due to their efforts as opposed to other factors?
13 That's what you want?

14 MR. HYLAND: I'm saying all the factors are relevant
15 here because this is about achieving a fair result.

16 THE COURT: If you want the discussion in resolving
17 this, really, of how much of the result is solely due to the
18 fine quality of your clients' work as opposed to other factors,
19 all right. I understand that's what you want. Go ahead.

20 I'm surprised to hear it, for a number of reasons.
21 One of them being I would have thought that that's not really
22 the legal analysis, but that's not the only reason; and now I
23 know your position, and I will certainly take it into account.

24 MR. HYLAND: The point I'm trying to make is this, the
25 result that was achieved for the Schreibers, no one has

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1 disputed was a great result. That's what I'm saying. They
2 didn't lose this case. They won everything.

3 But they are trying to do to the Nelkins what almost
4 happened to the Schreibers. They want to take everything away
5 that the Nelkins have earned over the last three and a half
6 years; and that's -- my point is that that is an extreme
7 remedy, an extreme penalty, and it is also something that is an
8 intensive fact analysis before a lawyer should be found to have
9 been terminated for cause.

10 Here, first of all, for the record, a lot of the
11 grounds for termination for cause that the Schreibers are
12 relying on, this court has said will not be considered because
13 Mr. Rosenblatt stood in this courtroom in February and said,
14 I'm not going to submit any declarations, I'm only going to
15 rely on the public record and on communications between the
16 Nelkins and the Schreibers. Then the Schreibers turned around
17 and submitted declarations with narratives about things that
18 were not in the public record and were not in the
19 communications, including secret recordings that we didn't know
20 about and that we have not had an opportunity to even look
21 into, as to whether there were more recordings. We have had no
22 discovery on that. All of that Your Honor has said you won't
23 consider.

24 So we are left with purely just the public record and
25 communications between the clients and the Nelkins.

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1 So I want to get to the grounds that the Schreibers
2 had set forth for the basis for their termination. First, they
3 say they, the Nelkins, violated Rule 1.8(a), governing business
4 transactions with clients.

5 THE COURT: Well, you heard it's about that as a basis
6 for release.

7 MR. HYLAND: Thank you.

8 THE COURT: So it won't take up much of your time.

9 MR. HYLAND: That was what I was basically going to
10 say, that it is not a grounds for termination for cause here.

11 THE COURT: Okay.

12 MR. HYLAND: Another ground that they point to is they
13 claim that the Nelkins prevented the Schreibers from getting
14 independent counsel for either the settlement or their dispute,
15 their fee disputes with the Nelkins. So they prevented us from
16 doing that. They refused to allow us to get independent
17 counsel.

18 Of course, this is contradicted by their own
19 statements in their declaration and by all of the evidence that
20 has been put in, to show that they absolutely consulted with
21 independent counsel, Mr. Weiss first and then Mr. Parness; that
22 my clients, the Nelkins, urged them to consult with independent
23 counsel on several occasions about both the settlement and the
24 fee issues; and that my clients met with Mr. Weiss, spoke to
25 him multiple times, and had multiple communications with

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1 Mr. Parness about these issues. So the idea that they
2 prevented the Schreibers from getting independent counsel is
3 clearly contradicted by the record.

4 Another ground that they assert for termination of
5 cause is that the Nelkins tried to impose upon them an
6 excessive fee. Now, they have, the Nelkins have a one-third
7 contingency arrangement. That's a pretty standard fee. So
8 clearly that's not excessive in and of itself.

9 What the Schreibers are claiming is that the Nelkins
10 intentionally inflated the value of the equity in order to
11 inflate the value their fees and that they imposed that on the
12 Schreibers and the Nelkins should be terminated on that ground.
13 What actually happened and what we put in our papers is that
14 the Nelkins, based on information primarily learned from the
15 Schreibers about the value of the company, reached what they
16 believed was a good-faith assessment of the value of the
17 settlement; and they calculated their contingency based on
18 that.

19 THE COURT: To the extent that you guys now think the
20 settlement is worth 20-some-odd million, when in relation to
21 the negotiations of the settlement, the length of the
22 settlement, did they come to that understanding?

23 MR. HYLAND: Throughout the entire litigation, from
24 the beginning of the litigation.

25 THE COURT: So at the time of the settlement, when it

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1 was being negotiated, they thought it was worth, the settlement
2 would be worth about 20 million?

3 MR. HYLAND: Twenty, twenty-five million, somewhere
4 around there.

5 THE COURT: So I will clearly have to segregate from
6 any analysis of this motion my recollections of what they said
7 about the matter. Go on.

8 MR. HYLAND: Okay. The settlement included the equity
9 as well as a number of other factors.

10 THE COURT: In terms of what the settlement was worth,
11 I should clearly not take into account anything they said
12 during the settlement negotiations about what they thought the
13 settlement was worth.

14 MR. HYLAND: Okay. I'm not familiar with what they
15 said.

16 THE COURT: No. They are, but it doesn't matter
17 because, I take it, you agree I should not take that into
18 account. Or should I?

19 MR. HYLAND: I don't know what was said. So it's hard
20 for me to know what --

21 THE COURT: It's a legal issue. Do you think it's
22 relevant to the analysis?

23 MR. HYLAND: No, I don't think so. I don't think so.

24 THE COURT: All right. Go ahead.

25 MR. HYLAND: The question here is whether or not they

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1 had a good-faith basis to have a view, based on the information
2 they had, as to the general range of the value of this equity
3 that was a major part of the settlement.

4 THE COURT: I will, of course, not take that into
5 account.

6 MR. HYLAND: Take what into account?

7 THE COURT: Things that were said during the
8 settlement negotiations. That's off for the analysis.

9 MR. HYLAND: Okay. The Schreibers argue that it was
10 improper for them to value the equity in the company as high as
11 they did because they should have known it was less than that.
12 One of the things that the Schreibers point to as evidence of
13 that is a report that the Schreibers claim the Nelkins'
14 commission asked, which we referred to as the Zak report. It's
15 an appraisal that, in fact, was commissioned by another lawyer,
16 Mr. Eisenberg, a tax lawyer that the Schreibers hired to help
17 them structure the settlement in a tax-advantaged way for them.

18 So they are now trying to impose the Zak valuation,
19 which was lower than the valuation that my clients believed was
20 a fair valuation. They are trying to sort of tie the Nelkins
21 to that valuation and say they should somehow be bound by it,
22 or they did something wrong by assessing a different valuation;
23 and the reality is the Nelkins were not the ones who
24 commissioned that report, and that report, first of all, says
25 specifically that it was created solely for tax-planning

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1 purposes and that if it were used for any other purpose it
2 would likely result in an erroneous outcome. It was also --

3 THE COURT: I don't think it would bear a whole lot on
4 the outcome of this motion; but use this for taxes but for
5 God's sake don't use it for anything else is --

6 MR. HYLAND: I'm not a tax expert, and we don't even
7 have an opinion on that report.

8 THE COURT: Okay. Move on. It's not terribly
9 relevant. Move on, please.

10 MR. HYLAND: Okay. The other thing that the
11 Schreibers claim as a grounds for termination for cause is that
12 the Nelkins impermissibly or improperly threatened to withdraw
13 from the representation, and the reason they are arguing this,
14 I understand, is because they are trying to analogize this
15 situation to the Holcombe case, which you determined, decided.
16 Absolutely not. The Nelkins did not impermissibly threaten to
17 withdraw.

18 What happened here is that when the fee dispute
19 started to arise and the Schreibers became unhappy with the
20 idea that they might have to pay the Nelkins some money --

21 THE COURT: Wait. Wait a minute.

22 MR. HYLAND: Sorry.

23 THE COURT: You are saying they became unhappy with
24 the idea of paying any fee?

25 MR. HYLAND: Yeah. They did not want to go out of

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1 pocket. So the idea was --

2 THE COURT: That's not what I asked.

3 MR. HYLAND: Oh, I'm sorry.

4 THE COURT: What you said was they became unhappy with
5 the idea of paying the Nelkins any fee. Is that really your
6 position, that they never intended to pay any fee?

7 MR. HYLAND: No, no, no. That's not my position. If
8 I misspoke, I misspoke.

9 THE COURT: So I'm not confusing your position with
10 the thing that you actually said.

11 MR. HYLAND: Then if I misspoke, I misspoke.

12 THE COURT: Should I allow you to correct that?

13 MR. HYLAND: Your Honor.

14 THE COURT: Should I?

15 MR. HYLAND: I would appreciate it. Thank you.

16 THE COURT: Should the court also be allowed to
17 correct misstatements?

18 MR. HYLAND: I think we --

19 THE COURT: And should it be the same standard for
20 both?

21 MR. HYLAND: I think it's apples and oranges.

22 THE COURT: I see. Move on, please. I will, of
23 course, allow you to correct a misstatement.

24 MR. HYLAND: I appreciate that.

25 The Schreibers did not want to go personally out of

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1 pocket to pay the Nelkins any of the fee because, as you know,
2 the settlement was not just going to be a cash payment. There
3 was also an equity portion. So there could be a result -- and
4 this was anticipated -- where the cash portion would not cover
5 the full value of the fee; and the Schreibers did not want to
6 go out of pocket for that. That's my only point, that they
7 didn't want to pay additional amounts beyond what they were
8 receiving in the settlement.

9 So when they realized that there was going to be a
10 component of this fee that might require an additional payment
11 beyond what they were receiving in the settlement, that's when
12 the relationship started to deteriorate.

13 THE COURT: In going into the settlement or even into
14 the litigation, did the Nelkins and the clients discuss that,
15 hey, what we might try and do, and this is going to be okay,
16 right, is we will keep any money that we get as a fee and you
17 will be left with the equity. In other words, go through the
18 litigation but don't expect to get any cash in your pocket out
19 of this because that's all going to go to counsel and you
20 should be satisfied with getting the Friedmans out. That was
21 the contemplation?

22 MR. HYLAND: That was contemplated, and that was part
23 of the purpose of the cash payment, was to pay the fees --
24 maybe I have got it wrong. Hold on one second.

25 (Pause.)

MICHELE NARDONE, CSR -- Official Court Reporter

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1 MR. HYLAND: I'm sorry. I apologize. I'm trying to
2 understand.

3 (Pause.)

4 MR. HYLAND: I'm not sure we are in disagreement, but
5 let me try to make it clear.

6 From the beginning the agreement was one-third
7 contingency on the value of the settlement, whether equity,
8 cash, or some combination of those things. It was always
9 possible that there would be enough cash paid that it could
10 amount to that one-third.

11 THE COURT: That quickly became apparent during the
12 settlement negotiations -- and I'm comfortable saying this
13 because it doesn't get into the negotiations so much as the
14 deal that ultimately emerged.

15 MR. HYLAND: Right.

16 THE COURT: That the monetary portion would only be a
17 component, and there would be other parts of it.

18 MR. HYLAND: That was always known, that there would
19 be some equity, because that was the whole purpose of the
20 litigation, was to save the equity of the company.

21 THE COURT: Before you conferred with your clients you
22 said yes, it was -- there was transparency between counsel and
23 client, that one possible outcome would be the clients get
24 nothing of a monetary nature out of the litigation because all
25 of the money goes to counsel as their fee. You said that was,

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1 in fact, contemplated.

2 Do you now wish to, having consulted with your
3 clients, correct an inadvertent error on that, or is that still
4 their position?

5 MR. HYLAND: I believe there was always a possibility
6 that the moneys that were paid would either mostly or
7 completely be used for the fee.

8 THE COURT: That was something that the clients
9 understood?

10 MR. HYLAND: That's not what happened here.

11 THE COURT: Excuse me, please. That was something
12 that the clients understood going into it?

13 MR. HYLAND: Yes, yeah.

14 THE COURT: All right. Go on.

15 MR. HYLAND: Here, to be clear, there were other cash
16 components. For example, the million dollars that the
17 Schreibers used to pay Koenig. I believe there was another
18 small amount of money that the Schreibers got. So, but the
19 bulk of the -- at least the 1.75, that was supposed to be
20 used -- and it was understood that that was going to be used --
21 towards the fees.

22 So at this point, when it became evident that the
23 value of the contingency fee was going to be larger than the
24 cash component that would be available to pay the Nelkins,
25 partly because the million dollars was being used to pay

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1 Koenig, things deteriorated; and there were a lot of
2 conversations between the Nelkins and the Schreibers, where, in
3 particular, Steven Schreiber, became incredibly abusive. If
4 you have read -- and I'm sure you have -- Carol Nelkin's
5 declaration, she talks about how the types of things that he
6 said to her, how painful that was for her, how traumatic it was
7 for her to hear those things; and this happened over and over
8 again during this period of time.

9 And because of that, the Nelkins, as any reasonable
10 attorney would, said a couple of things. One thing that they
11 said to the Schreibers is, in substance, You don't seem happy
12 with us. Do you want us to withdraw? Do you want other
13 counsel? The other thing they said at certain points was, We
14 can't continue to represent you if you are going to be abusive
15 in this way.

16 THE COURT: I just want to pause. Forgive me, please,
17 for the interruption.

18 But, to the extent you are going into communications
19 between them, I think there is not a privilege issue that
20 attaches -- I'm not bothered about that -- but, at the outset
21 of your argument, you were very insistent, and understandably
22 so, on keeping out from my consideration communications between
23 them. What I hope to avoid is a situation where one side or
24 another is saying you can consider communications between the
25 Nelkins and the clients but only some of them.

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1 MR. HYLAND: When we stood here in February --

2 THE COURT: I understand what you are going to say on
3 this, but I'm asking you a somewhat different question. Are
4 you saying that I should consider partly because -- maybe
5 entirely -- because of the timing of when it was brought to my
6 attention, I should consider some communications between the
7 Nelkins and the Schreibers but not others?

8 MR. HYLAND: I believe that it's proper for you to
9 consider the communications that are described in Carol
10 Nelkin's --

11 THE COURT: Please answer my question, because you
12 understand it and you understand that I'm trying to get a
13 commitment one way or the other so I have a clear record on
14 that.

15 MR. HYLAND: Yes. I have never said that you
16 shouldn't consider communication.

17 THE COURT: So the position you are advocating now is
18 that I should consider some but not all communications between
19 the Nelkins and the Schreibers?

20 MR. HYLAND: Yes.

21 THE COURT: Okay.

22 MR. HYLAND: Let me explain why.

23 THE COURT: Yes.

24 MR. HYLAND: Because when we stood here in February
25 you asked Mr. Rosenblatt, Do you intend to rely on anything

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1 other than the documents or the public record, and he said no.

2 THE COURT: Yes.

3 MR. HYLAND: Can I finish, please?

4 THE COURT: Here is what you can do. You can tell me
5 if this is yet another example of where, regardless of what the
6 court's understanding was, you want to -- or its intention, you
7 want to trap people to a certain --

8 MR. HYLAND: Absolutely not.

9 THE COURT: Okay. So, look, again --

10 MR. HYLAND: Can I please finish what I was saying?

11 THE COURT: Please. Okay. Yes. I don't want to be
12 unfair. Please finish what you are saying, but I will come
13 back to this, because it is a terribly dissatisfactory position
14 you are advocating.

15 MR. HYLAND: Let me try to explain it better then. On
16 that same day when Mr. Rosenblatt said, I'm not putting in any
17 declarations, I made very clear that we would be putting in
18 declarations, and I believed it was proper to do so; and we
19 asked for discovery, and we asked that we be able to examine
20 any declarations that were put in. Because Mr. Rosenblatt was
21 opposing discovery and did not want to have to do that, he
22 said, I'm not putting in any declarations. We never made that
23 representation. We said the opposite, and that's what we did;
24 and I think we are entitled to have our declarations
25 considered.

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1 THE COURT: Well, you are entitled to have them
2 considered based on that order, but, to the extent that the
3 motion may turn on who said what to whom when and with what
4 intention, in your conversations with each other -- I'm not
5 talking about stuff that's filed on the public docket and
6 positions; I don't think you need any discovery for that, and
7 there are no two sides about it. It is what it is -- but I
8 certainly anticipated that the motion would be decided on the
9 merits without getting into who said what to whom when about
10 what.

11 And I think everybody would agree, if we are looking
12 at it as an issue, that we are not going to have some of the
13 conversations but not others. Of course, if any of it is
14 considered, perhaps discovery into who said what when, to
15 develop a full record, is appropriate; but what I think is not
16 geared to a fair resolution on the merits is regardless of the
17 timing of when they were presented take into account these
18 portions of the conversations but not others.

19 So I'm happy to exclude all of them, everything
20 outside of what was filed on the docket during the litigation.
21 I'm also having to take into account everyone's take on who
22 said what when; but I think we risk an unfair resolution if we
23 just take into account some. Do you disagree with that?

24 MR. HYLAND: I don't know. Evidence is excluded for
25 all kinds of reasons all the time.

MICHELE NARDONE, CSR -- Official Court Reporter

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1 THE COURT: Yes, and, as with some of our prior
2 conversation this morning, I was asking the question not about
3 what you think the law is on this but in this instance what you
4 think is fair; and I take it you don't need to do legal
5 research to find out what you think is fair or what your
6 clients think is fair.

7 MR. HYLAND: We are responding to an accusation, an
8 accusation that my clients threatened improperly to withdraw.
9 If that's going to be a basis for a determination, we have to
10 be able to respond to that. That's all I'm saying.

11 THE COURT: I will do my best not to ask any further
12 questions, Ms. Hyland, because it's very difficult to get a
13 direct response to a simple question. So please finish.

14 MR. HYLAND: I --

15 THE COURT: So please finish your arguments, and I
16 will listen to you until you are done.

17 MR. HYLAND: Okay. What I was getting to and what I
18 was getting at is to the extent that this alleged improper
19 threat to withdraw is relevant to the determination, we are
20 just trying to explain what happened; and what happened was
21 with all of the abuse, the verbal abuse, the Nelkins said maybe
22 you don't want us as your lawyers and maybe we shouldn't be
23 your lawyers. When that happened, there were threats, and
24 these are their claims and, I believe, these are reflected in
25 the e-mails, so they are proper, that the Schreibers made

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1 accusing the Nelkins of abandoning them, of threatening them.

2 I'm just trying to explain the reason why those
3 incidents took place. It wasn't like the Holcombe case, where
4 the lawyer threatened to withdraw because the client wasn't
5 complying with the lawyer's view of the settlement, you know,
6 the client didn't want to settle and the lawyer did, or vice
7 verse. That is not the type of thing that happened here. It
8 was not an improper threat to withdraw. It was simply a
9 conversation that the Nelkins were having about whether it was
10 a good idea for them to continue representing the Schreibers
11 under the circumstances.

12 So at that point, when the relationship was breaking
13 down, the Nelkins had a choice: To stay in and keep fighting
14 or to get out. Having been threatened that if they tried to
15 get out they would be accused of abandoning their clients, and
16 also because they were so close to negotiating this settlement,
17 they stayed in and they stuck with it and they finished the
18 settlement. They never put their interests above their
19 clients' in the course of that representation. They did
20 everything they could to get the settlement done and to
21 complete it, despite the barrage and despite the fraught nature
22 of the relationship.

23 Then, 22 minutes after that settlement became
24 effective, Mr. Eugene Schreiber wrote a letter to this court
25 accusing the Nelkins of charging an excessive fee, of being

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1 unjust, and asking the court to intervene. That letter was
2 followed by two more letters by Mr. Parness, now the
3 Schreibers' new lawyer of record in the case, also presenting
4 the court with the -- or asking the court to intervene in this
5 fee dispute, asking for a declaratory judgment that the Nelkins
6 were not entitled to the fee. That is when the Nelkins
7 responded, not before then, not -- they did not come to the
8 court. They did not disclose what was going on to anyone.
9 They didn't want to jeopardize the settlement, which would have
10 been jeopardized potentially if they had come to the court and
11 tried to get this resolved by the court before the right time.

12 Everything they did at that point was in response to
13 what the Schreibers did, the Schreibers represented by their
14 own counsel, the Schreibers who had stopped communicating
15 directly with the Nelkins. At that point, and under the case
16 law, that amounts to a decision to sever the attorney-client
17 relationship that the Schreibers made. They were no longer
18 talking to their lawyers, they had a new lawyer, they had a new
19 lawyer of record in the case; and they were presenting the
20 dispute to the court to resolve.

21 That, at that point the Nelkins believed, and
22 reasonably believed, that the relationship was over. They had
23 accomplished everything that they had been asked to do in this
24 case. They had settled the case, and the settlement was final,
25 and the defendants were obligated to pay it. At that point,

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1 when they realized that their clients had spent -- waited 22
2 minutes after that settlement had been finalized to come to the
3 court, they realized that, okay, they no longer want us as
4 their lawyers, this is over now; and they were also ordered by
5 the court to respond to that letter, which they did.

6 They have a right, under Rule 1.6, when being accused
7 of wrongdoing and in order to collect a fee when that fee is
8 being denied to them, to respond to that and to give a
9 full-throated response without -- so that they are not waiving
10 their arguments. They have a right to do that under the rules,
11 and what they did was proper.

12 The main argument here is that they didn't technically
13 get relieved as counsel, but the case law says that if you are
14 discharged by your client the fact that you have not yet been
15 formally relieved as counsel does not mean the relationship is
16 not over. It is over upon discharge, and at that point on, if
17 you have a fee dispute, you are allowed to defend yourself and
18 you are allowed to assert your right to your fee. The
19 Schreibers have also claimed that having asserted a charging
20 language is a statutory right that can be asserted by a lawyer
21 even while they still represent a client, very clearly under
22 the case law.

23 The Schreibers have argued that the Nelkins did
24 something wrong by delaying in moving to fix their charging
25 lien, meaning delaying in moving to ask that their fee be

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1 determined. A lawyer has two options, once they have a
2 charging lien: They can move to fix the charging lien, or they
3 can commence a plenary action. Those are essentially legally
4 equivalent. So, on the one hand, the Schreibers are saying you
5 should have moved to fix your charging lien, but you shouldn't
6 have filed a plenary action; and the case law says otherwise.
7 It says, yes, you absolutely can at this point, at this stage,
8 under these circumstances the lawyer can commence the plenary
9 action to collect their fee.

10 It was not at all intended to be secret. They filed
11 it. They told the court and they told the Schreibers that they
12 were going to file it. They broadcast it to them before they
13 did it, to the court and the Schreibers, before they did it.
14 They filed it shortly before they were about to appear in
15 court, and they identified it as a related matter in this case
16 so that it would wind up before Your Honor. There is nothing
17 secretive about that. It was entirely a transparent thing.

18 What they regret is that when they got in here -- and
19 sometimes it's hard to say what you want to say when you are in
20 here and you are not answering a direct question. It was very
21 difficult for them, when they got in here, to figure out the
22 opening to bring this up with the court. So it didn't come up.
23 It didn't come up that day, but they believed they had done
24 what they were supposed to do by identifying it as a related
25 action so that it would come before Your Honor; and that was

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1 done before they came into court that day. So there was not
2 ever any intent to be secretive about it.

3 I also would like to point out that our position is
4 that -- and I think it's well supported -- that by the
5 Schreibers' actions, as I have said, they discharged the
6 Nelkins; but there is case law -- and we do cite it in our
7 brief -- that says even if the Nelkins -- even if a client is
8 still a current client it is not a conflict, if you have a fee
9 dispute, to commence a legal proceeding to collect your fee.
10 The case law says that, and even Mr. Rosenblatt acknowledged
11 that today when he was making his arguments.

12 So whether or not the court agrees that they were
13 discharged or not discharged, the filing of a fee complaint
14 against the client under the case law is permitted. It's not a
15 violation of the ethics rules. It is not a breach of any
16 fiduciary duty.

17 THE COURT: No --

18 MR. HYLAND: Sorry.

19 THE COURT: No. It's not going to be terribly useful
20 to me. Continue, please.

21 MR. HYLAND: I think I have addressed all of the
22 arguments that the Schreibers have made as grounds for
23 termination for cause.

24 We submit that termination for cause and complete
25 forfeiture is not just, is not the remedy, an appropriate

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1 remedy here, and is not warranted by the evidence or the law.

2 Thank you, Your Honor.

3 THE COURT: Thank you.

4 Mr. Rosenblatt, briefly.

5 MR. ROSENBLATT: Yes. I will try and keep it brief.

6 I just want to correct just a couple of things for the
7 record. I don't know that they are particularly relevant. I
8 just want to make sure the record is clear.

9 When we were here back in February -- I think Your
10 Honor will recall; I certainly have the transcript -- I never
11 said I wasn't going to submit any declaration. What I said
12 is I would submit communications and proposed settlement
13 offers, an agreement between the Nelkins and their clients, the
14 Schreibers, which is what I did. I basically kept my
15 declarations limited to just Eugene and Steven, submitted just
16 communications between them and Mr. Parness, who was
17 intervening on behalf of the Schreibers at a certain point, and
18 proposed settlement agreements; and then my declaration was
19 limited to transcripts and docket entries and things that were
20 public record. So I really did abide by that.

21 In addition, I didn't say that I wasn't waiving any
22 right to present any other evidence, but I didn't. So I just
23 want to make that clear for the record.

24 In addition, just to be clear, with regard to the
25 proposed settlements, beginning with the first settlement

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1 statement that the Nelkins provided in June of 2018 when the
2 settlement was being finalized in the underlying case and they
3 were trying to formulate a settlement, every single time it
4 represented, or least from the beginning it represented a cash
5 payment to them and equity in the company. It was never just
6 the Schreibers take equity, the Nelkins take the cash, and
7 everybody go on their way. There was an equity component to it
8 at that point. Only later, when it become clear that my
9 clients were not going to consent to an equity component, the
10 Nelkins then asked for the cash, all of the cash and an
11 additional payment of a million dollars over a period of time
12 that required out-of-pocket payments. So I just wanted to
13 clarify that for the record as well.

14 The notion that the Nelkins somehow tacitly believed
15 there was a technical discharge or there was a technical
16 severing of the attorney-client relationship is somewhat
17 laughable because they kept appearing in this court, including
18 on the day that they sued their own clients, and never
19 disclosed it to the court. Now, I heard what counsel said
20 about not being able to say what you want to say in this
21 courtroom; and, Your Honor, I will say this. Your Honor
22 certainly puts counsel through their paces, but I have never
23 seen Your Honor not allow a party to say what they want to say
24 about what's going on; and certainly something like filing a
25 complaint against your own client while you are appearing in

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1 court on the same day, the notion that it wasn't intended to be
2 secret and that it was entirely transparent -- were counsel's
3 words -- I think, are -- let's just say are belied by what
4 actually happened.

5 The thought that they submitted a full-throated
6 response -- again, counsel's words -- to the Schreibers'
7 objections to the prepared fee arrangement, again, a little bit
8 belied by what actually happened. We are not talking about a
9 full-throated response. We are talking about never making a
10 motion to withdraw, never trying to get out of the case by
11 claiming or asserting to the court that a breakdown in
12 communications occurred. Rather, they simply took it upon
13 themselves to say, oh, well, the representation is terminated
14 and so why don't we put a letter on the record, in full view of
15 the judge, in full view of the adversary, that calls our
16 clients fraudsters acting in bad faith.

17 Again, this is beyond the pale; and counsel started
18 her arguments by saying that finding discharge for cause is an
19 extreme remedy. Well, yes, it is; and that's why we are here,
20 because what the Nelkins did was so extreme and so beyond what
21 attorneys should be doing and even in the cases that we talked
22 about and I mentioned before, it talks about putting an
23 attorney's interests above those of his or her client, this
24 goes beyond this turned the client into an adversary. And,
25 again, the cases are paramount that that is grounds for

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1 discharge for cause, and that's what happened here.

2 We submit, Your Honor, that our motion should be
3 granted; that the Nelkins should be found to be discharged for
4 cause; and that the charging lien should be vacated. Thank
5 you.

6 THE COURT: Ms. Rosenblatt, it's your motion. I'm
7 going to ask you to try to work out the cost, if it's an issue;
8 but I would like to get the transcript of this submitted,
9 please. Obviously, you should split. If you can't agree on
10 it, let me know.

11 MR. ROSENBLATT: Okay.

12 THE COURT: So I can take that part of the record.

13 So just to recap, I will get the letter by Monday that
14 has the language that the Nelkins agree would suffice to
15 effect, under Rule 60(a), the correction of the clerical error
16 that might lead anybody to claim that the instant motion was
17 extinguished.

18 MR. HYLAND: Your Honor, may I make one request about
19 that?

20 THE COURT: Please don't. I will give you your
21 course.

22 I am directing you to submit the language that you
23 agree will effect that result, along with, of course, any
24 arguments that you wish me to consider as to whether the court
25 should or can enter such an order. What I don't think is

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1 fairly subject to dispute is that if the court thinks it's
2 appropriate it should be done in an effective way, and I just
3 want to make sure that if that happens it is done in a way that
4 your clients not later claim is ineffective, because that's
5 terribly inefficient, because there will be yet another
6 clerical error or inadvertent statement to be corrected. And
7 I'm sure we don't want to go through multiple iterations of the
8 dispute.

9 Yes? Go ahead.

10 MR. HYLAND: Our office is in the middle, today, of a
11 move from midtown to downtown, and I'm just asking for one
12 extra day, so it's not Monday.

13 THE COURT: Of course.

14 MR. HYLAND: Thank you.

15 THE COURT: So I will get that letter by Tuesday, and
16 then I won't put a time limit on it, but, please, quickly order
17 the transcript and submit it on the record; and then I will
18 address the motion in writing in due course.

19 Thank you all. Have a good day.

20 MR. HYLAND: Thank you, Your Honor.

21 MR. ROSENBLATT: Thank you, Your Honor.

22 (End of proceedings.)

23 o O o

24 Certified to be a true and accurate transcript.
25 /s/ Michele Nardone
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